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Supreme Court, U.S.

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No.

JOSEPH E. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

MICHAEL NULL,
Petitioner,

--VS--

CITY OF LANSING, MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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May 29, 1990

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in deferring to the trial court's discretion to impose rule 11 sanctions where the trial court had based those sanctions upon a legally erroneous conclusion concerning the merits of the constitutional challenge presented below and upon a factually unsupported presumption concerning the purpose for which that challenge may have been asserted?

2. Whether the constitutional challenge presented below was warranted by existing law or by a good faith argument for the extension of existing law so as to withstand proper scrutiny under rule 11?

PARTIES

The parties to the proceedings below were the Appellants, Karen Christy, who was the Plaintiff in the District Court and Michael Null, who was her trial attorney, and the Appellee, the City of Lansing, Michigan, which was the Defendant in the trial court. Both Christy and Null are natural persons and Lansing is a governmental body politic and corporate under the constitution and laws of the State of Michigan. Karen Christy is not a party to this petition.

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**PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Michael Null, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in order to review portions of that court's opinion filed on January 17, 1990.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Sixth Circuit is reprinted in the appendix to this petition at page 1a. The opinion is not reported in full, but the Court of Appeal's disposition is indicated in a table at 893 F.2d 1334 (6th Cir. 1990).

The opinions and orders of the United States District Court for the Western District of Michigan are reprinted in the appendix to this petition beginning at 7a. The District Court's opinion relevant to the issues raised here is reported at 693 F.Supp. 558 (E.D. Mich. 1988).

JURISDICTION

The District Court had jurisdiction over this action under Title 28, United States Code, sections 1331 and 1343 because this case arises under the first and fourteenth amendments to the Constitution of the United States and under Title 42, United States Code, section 1983. On August 30, 1988, the District Court, having previously dismissed the Plaintiffs' complaint *sua sponte*, imposed sanctions under rule 11 of the Federal Rules of Civil Procedure upon the Plaintiff's counsel, Michael Null, who is the Petitioner here. *See infra* at 24a.

The Court of Appeals had jurisdiction over this appeal under Title 28, United States Code, section 1291 because the Petitioner sought review and reversal of the August 30 final judgment of the District Court. The notice of appeal was filed on September 13, 1988. On January 17, 1990, the Court of Appeals affirmed the District Court's imposition of rule 11 sanctions, *see infra* at 5a, and it denied the Petitioner's request for rehearing on February 28, 1990, *see infra* at 6a.

STATUTES INVOLVED

This petition raises questions concerning the application and construction of rule 11 of the Federal Rules of Civil Procedure 11. The pertinent provisions of this rule are set forth immediately *infra*.

Rule 11, Federal Rules of Civil Procedure:

Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule,

the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

On or about March 8, 1988, Karen Christy ("Christy") filed this action in the United States District Court for the Western District of Michigan against the City of Lansing, Michigan ("Lansing"). She sought a declaration that the Certificate of Occupancy provisions, chapter 3, section 307, contained in the Lansing Uniform Building Code (hereinafter "occupancy permit provisions") were overbroad because they could be used, and in fact were used, to censor or punish constitutionally protected speech without any of the substantive or procedural safeguards required of legislation which directly or indirectly regulates speech. *See infra* at 2a. Christy also sought both preliminary and permanent injunctive relief against enforcement of the current occupancy code provisions against her. *Id.* Christy owned and operated a book, video, and novelty store located in Lansing from which she wished to sell, rent, and display, *inter alia*, certain sexually oriented but nonobscene books, magazines, video tapes, lingerie, and gift items. She fully intended, however, to operate her store in accordance with the applicable Lansing ordinances concerning adult uses. (R. Item 1, Complaint at para. 12). Lansing had issued Christy an occupancy permit for her store on or about October 20, 1983, but it summarily revoked that permit on August 6, 1987. *See infra* at 2a.

At the same time she filed her complaint, Christy moved for a preliminary injunction preventing Lansing and its agents from enforcing the occupancy permit provisions against Christy until the trial court could adjudicate her constitutional challenge to those provisions. *See infra* at 2a. Both parties briefed the preliminary injunction issues, and the trial court heard the parties' arguments on those issues on May 24, 1988. At the conclusion of that hearing, the trial court denied Christy's request for a preliminary injunction. *See infra* at 3a, 14a. On its own motion and without any further briefing or argument, the trial court also concluded that Christy's claim was "lacking in merit, frivolous and an attack collaterally upon judgments or rulings in other lawsuits," and it dismissed this action. *See infra* at 3a, 14a.

On July 7, 1988, Lansing filed a motion seeking \$5,592.50 in attorneys' fees sanctions under Rule 11, Fed. R. Civ. P. 11, *see infra* at 3a, noting that the trial court had concluded *sua sponte* on May 24 that Christy's challenge to the occupancy permit provisions was frivolous. Lansing appended to its motion a one-page, unsworn "bill of costs" in which it listed \$167.50 in unspecified costs and 43.4 hours of time allegedly spent by unspecified persons broken down into fourteen broad and often vague general activity categories. (R. Item 10, Motion for Attorneys' Fees, Exh. 2). Lansing offered no information concerning the reasonableness of the expenditures listed or of the amount of the hourly rate charged by whomever carried out the listed activities.

On August 30, the trial court entered an opinion and order granting to Lansing all of the \$5,592.50 which it had requested as costs and attorneys' fees. *See infra* at 3a, 24a. The trial court reaffirmed its conclusion that Christy's constitutional challenge was frivolous, *see infra* at 15a, 16a, 21a. In support of this conclusion, the trial court held that a facial overbreadth challenge such as

Christy's is simply not available where the legislation in question does not expressly regulate speech on the basis of its content. *See infra* at 18a, 20a. The court also believed that the cases upon which Christy based her challenge were distinguishable from the instant situation and that "there is no case law which directly supports the asserted theory." *See infra* at 19a. For these reasons, the court stated that Christy's complaint "is properly characterized as frivolous." *See infra* at 21a. Finally, noting only that "counsel was ultimately responsible for ensuring any claim presented was based on good faith application of the law," the trial court assessed the \$5,592.50 attorneys' fees sanction directly against Christy's counsel, Michael Null ("Null"), rather than against the party herself. *See infra* at 23a.

On September 13, 1988, attorney Null filed a timely notice of appeal from the trial court's August 30 decision and order concerning the rule 11 sanctions. That matter was subsequently consolidated with another appeal by Christy involving separate issues which are not raised in this petition.¹ *See infra* at 1a. With respect to the rule 11 issues, Null argued on appeal that the facial challenge which the Christy advanced against Lansing's occupancy permit provisions was fully warranted by existing law or by a good faith argument for the extension of existing law and that the trial court had therefore erred as a matter of law in determining that the challenge was frivolous and in imposing sanctions. *See infra* at 4a-5a. Null further argued that the trial court's "inference that the present action . . . may have been commenced for purposes of revenge or harassment," *see infra* at 22a, was inextricably intertwined with its erroneous legal conclusion and that,

¹This petition seeks review only of those questions raised by the record which relate to trial court's imposition of rule 11 sanctions upon Null. The underlying merits of Christy's challenge to the occupancy permit provisions are therefore relevant only insofar as they bear upon whether those sanctions were properly imposed.

in any event, the inference lacked any proper basis in the record and could not support the sanctions imposed against Null. Null also challenged the trial court's articulated standard for evaluating the complaint as impermissibly strict under rule 11. On January 17, 1990, the Court of Appeals issued its *per curiam* decision. See *infra* at 1a. Without expressly addressing Null's challenges to the trial court's legal conclusions underlying the imposition of sanctions, the Court of Appeals simply determined that "[g]iven the facts of this case, especially the prior history of lawsuits between the parties, we cannot say that the district court abused its discretion in imposing Rule 11 sanctions against Christy's attorney, Mr. Null." See *infra* at 5a. The Court of Appeals subsequently denied Null's petition for rehearing on February 28, 1990. See *infra* at 6a.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Erred in Deferring to the Trial Court's Discretion to Impose Rule 11 Sanctions Where the Trial Court Had Based Those Sanctions Upon a Legally Erroneous Conclusion Concerning the Merits of the Constitutional Challenge Presented Below and Upon a Factually Unsupported Presumption Concerning the Purpose for Which that Challenge May Have Been Asserted.

The Court of Appeals should have reviewed the trial court's decision to impose rule 11 sanctions in this case *de novo* because that decision was inextricably intertwined with and directly dependent upon the trial court's erroneous assessment of the legal merits of the constitutional challenge which Christy had advanced against Lansing's occupancy permit provisions. This

Court has recently recognized that appellate courts must generally review trial court determinations concerning questions of law *de novo*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1988), and the trial court in this case had expressly relied upon its legal "reasons for . . . dismiss[ing] . . . the complaint to explain why [the complaint] is properly characterized as frivolous," and thus warranted sanctions, *see infra* at 21a. Instead of carefully considering the trial court's express legal reasoning or the specific legal errors which Null claimed tainted the trial court's imposition of sanctions, however, the Court of Appeals merely deferred generally to trial court's discretion. Noting that, in the Sixth Circuit, "[a] district court's decision regarding [rule 11] sanctions is reviewed under an abuse of discretion standard because of the district court's more intimate knowledge of the facts of these cases," *see infra* at 5a (internal quotation marks omitted), the Court of Appeals simply stated that it could not reverse the order imposing sanctions here under this more deferential standard of review.

While there are certainly many circumstances under which an appellate court should properly review questions concerning rule 11 sanctions for an abuse of the trial court's discretion, this case presents no such occasion. The trial court below imposed sanctions because it concluded that the constitutional challenge presented in the complaint was frivolous and because it believed that "the state of the facts and the law is [sic] so plain as to render unavoidable the conclusion that plaintiff's counsel either knew or should have known that it was frivolous." *See infra* at 21a. As discussed *infra*, the trial court did not conclude that the *facts* underlying this litigation rendered Christy's constitutional claim frivolous, nor did it independently ground its sanctions upon its assessment of the Christy's or Null's conduct of this litigation. Furthermore, the trial court conducted no inquiry into the extent of Null's pre-filing investigation, apparently concluding as a matter of law that any

reasonable investigation would have disclosed that the challenge had no chance of succeeding in court. See *infra* at 21a. Under such circumstances, the trial court's closer proximity to the proceedings does not warrant any particular deference. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) ("decision whether a pleading or motion is legally sufficient involves a question of law subject to *de novo* review"); *Stevens v. Lawyers Mutual Liability Insurance Co. of North Carolina*, 789 F.2d 1056, 1060 (4th Cir. 1986) (trial court's erroneous assessment of legal merits of claim not entitled to deference); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986) (legal conclusion that, on established facts, sanctions are warranted subject to *de novo* review); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (1985) (questions concerning pleading's legal sufficiency subject to *de novo* review); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 n. 7 (2nd Cir. 1985) (appellate court in as good a position as trial court to determine whether pleading was legally groundless and need not defer to trial court on that issue). In this case, Null's appeal from the order imposing rule 11 sanctions presented virtually pure questions of law identical to those which would have been presented on a direct appeal from the trial court's May 24, 1988 dismissal of the complaint. The Court of Appeals should have reviewed these issues under an essentially *de novo* standard.

In deferring to the trial court's discretion concerning essentially legal questions, and in refusing to review the trial court's legal assessment of Christy's constitutional challenge, the Court of Appeals in this case applied a different standard of review than that which would have been applied by many of its sister circuits. In particular, the Second, Eleventh, and District of Columbia Circuits all expressly apply a *de novo* standard of review to questions concerning whether rule 11 sanctions are warranted by pleadings, motions, or other papers which are challenged as unwarranted by existing law or by a

good faith argument for the extension, modification, or reversal of existing law. *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2nd Cir. 1985); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (1985). Furthermore, the Ninth Circuit has articulated and adopted a three-tiered standard of review which reviews essentially legal matters concerning the propriety of rule 11 sanctions, such as whether a claim is sanctionably frivolous, under a *de novo* standard while reserving more deferential appellate review for issues which are primarily fact-bound or which involve a trial court's choice among available sanctions under rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

Even some of those Circuits which have articulated an abuse of discretion standard as appropriate for review of all questions involving rule 11 sanctions have recognized that a trial court's pure legal errors cannot escape traditional appellate scrutiny merely because those errors relate to the imposition of rule 11 sanctions. *See, e.g. Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989) ("[a]ll of the 'pure' questions of law implicit or explicit in the district judge's findings are reviewable for error"); *see also Century Products, Inc. v. Sutter*, 837 F.2d 247, 253 (6th Cir. 1988) (Nelson, J. concurring) (suggesting, prior to the instant case, the possibility of *de novo* review of questions of law in Sixth Circuit). Although the Fourth Circuit, for instance, has stated that "a district court's imposition of rule 11 sanctions is ordinarily entitled to deference by this Court and may not be disturbed except for abuse of discretion," *Stevens v. Lawyers Mutual Liability Insurance Co. of North Carolina*, 789 F.2d 1056, 1060 (4th Cir. 1986), *citing Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984), it unhesitatingly reversed an order imposing rule 11 sanctions upon a claim which a trial court had erroneously believed was legally frivolous,

Stevens, at 1060 (disagreeing with trial court's assessment of declaratory judgment action and consequently concluding that trial court's sanctions order in that action "is not entitled to deference and must be reversed as an abuse of discretion").

Indeed, any other result could potentially lead to an absurd result in cases in which the parties appeal both a dismissal of a complaint for failure to state a claim and an order imposing rule 11 sanctions because the complaint was frivolous. In a case involving a very close question concerning the substantive law governing the claim presented in the complaint, the appellate court might nevertheless reverse the dismissal without any particular deference to the trial court. If the appellate court were actually required to apply a more deferential standard of review to the rule 11 order, however, it might have difficulty concluding the trial court's decision on the close legal question involved an abuse of discretion. In such a case, the conflicting standards of review would lead the appellate court to reverse the dismissal and remand the case for further proceedings on the complaint while upholding the sanctions which were expressly predicated upon the supposed frivolousness of that complaint. No doubt a court of appeals would strive to avoid such a result if presented with such an appeal, but there is no reason to require a party not otherwise inclined to appeal from a dismissal such as that in the foregoing example to do so merely to insure that a trial court's legal conclusions do not receive inappropriate deference simply because they support a sanctions determination under rule 11. A sanctioned individual should be able to challenge a rule 11 order under an appropriate standard of review even though the substantive issues which prompted the sanction are not themselves directly carried to the appellate court. This is particularly true for a sanctioned attorney, such as Null, who, because not technically a party in the trial court, is simply not entitled to determine for himself whether a

dismissal will be appealed.

The Fourth Circuit's decision in *Stevens v. Lawyers Mutual Liability Insurance Co. of North Carolina*, 789 F.2d 1056 (4th Cir. 1986), suggests that the actual difference between *de novo* and abuse of discretion review of a purely legal decision underlying the imposition of rule 11 sanctions may be largely semantic. In that case, the court first articulated an abuse of discretion standard for reviewing questions involving rule 11 sanctions, *id.* at 1060, but then promptly reversed such a sanction because it was based upon a legal conclusion of the trial court which substantive *de novo* review had revealed to be erroneous, *id.* Indeed, many have recognized that the "abuse of discretion" standard of review in fact embraces a wide range of functional standards, each to be applied for a particular purpose or under particular circumstances. Judge Friendly has noted, for instance, that:

[t]here are half a dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error only by the slightest nuance, with numerous variations between the extremes.

Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 763 (1982). Similarly, the Third Circuit has noted that "a wide variety of decisions covering a broad range of subject matters" is committed to the sound discretion of a trial court, and that review of such matters generally proceeds under an "abuse of discretion" standard. *United States v. Criden*, 648 F.2d 814, 817 (3rd Cir. 1981). Nevertheless, "in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the

first place." *Id.*

The Sixth Circuit has also recognized that, at least in the context of determining whether a preliminary injunction should issue "[a] district court abuses its discretion when it relies on clearly erroneous findings of fact, . . . or when it improperly applies the law or uses an erroneous legal standard." *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dism'd* 469 U.S. 1200 (1985) (citations omitted); *see also Lowary v. Lexington Local Board of Education*, 854 F.2d 131, 134 (6th Cir. 1988); *Christy v. Ann Arbor*, 824 F.2d 489, 491 (6th Cir. 1987), *cert. den'd*, 108 S.Ct. 1013 (1988).² Thus even if the Court of Appeals were correct in characterizing the general standard for reviewing rule 11 matters as a search for an abuse of the trial court's discretion, that standard would not function in the same way when the appellate court is reviewing the severity of a sanction or a trial court's finding that a claim was not "well grounded in fact," *cf.* Fed. R. Civ. P. 11, as it would when the appellate court reviews a legal determination that a claim was frivolous because legally unwarranted. Here, where the trial court expressly grounded its order imposing sanctions upon its legal conclusion concerning the merits of Christy's claims, the Court of Appeals should not have deferred to that conclusion in the face of Null's claims on appeal that it was erroneous.

Apart from the trial court's conclusions concerning the underlying substantive law, addressed in detail *infra*, the Court of Appeals should also have reviewed, again for legal error, two other legal determinations which are implicit in the trial court's decision imposing the

²Before the Court of Appeals, Null articulated his argument largely in terms of this definition of the abuse of discretion standard. In so doing, he always argued, as here, that the trial court's erroneous legal conclusions were entitled to no deference on review.

sanctions and which Null had challenged on appeal as erroneous. First, the trial court articulated an impossibly strict standard for measuring the legal merits of a claim against rule 11's requirement that it be "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Cf. Fed. R. Civ. P. 11. In concluding that Christy's challenge was frivolous, the trial court observed that "there is no case law which directly supports the asserted theory," *see infra* at 19a, and that the cases cited in support of the challenge involved "materially distinguishable" underlying facts, *see infra* at 18a, 19a n. 2. The court did not indicate that Christy had proceeded in the face of recently decided controlling precedent or of well-settled statutory or case law of such long standing and continuous application that it cannot seriously be questioned. Instead, the trial court concluded that the challenge was frivolous merely because no reported case indicates that any building code occupancy permit provisions had previously been invalidated under the theory which Christy advanced below. Yet a party advancing a claim in federal court plainly need not cite a single, previously-decided case precisely in point in order to demonstrate that its argument is "warranted by existing law" let alone by "a good faith argument for the extension . . . of existing law." Often, as here, a party must bring together doctrines announced in different lines of cases and must argue that these doctrines should be coherently applied to a unique set of facts. The general test of propriety under rule 11 is one of "reasonableness under the circumstances," Fed. R. Civ. P. 11 Committee Comments, and the framers of the 1983 amendment indicated that a party who advances a claim "based on a plausible view of the law" acts reasonably within the meaning of this general test, *id.* Since the trial court's standard for imposing sanctions under rule 11 is stronger even than that appropriate to determine whether a claim should succeed on the merits, the Court of Appeals should certainly not have deferred at all to

the trial court's articulation of that standard.

Second, even if the Court of Appeals believed that the trial court's "inference that the present action, obviously lacking in merit, may have been commenced for purposes of revenge or harassment," *see infra* at 22a, was independent of its legal conclusion concerning the underlying merits of the constitutional challenge and that the inference was properly supported by the record, matters which are addressed *infra*, the Court of Appeals should have considered whether a legally plausible claim asserted in a procedurally proper manner can ever warrant sanctions under the "improper purpose" clause of rule 11. The Ninth Circuit has determined such a plausible claim may not be sanctioned as interposed for an improper purpose since "a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the 'well grounded in fact and warranted by existing law' clause of the rule." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986). While there may well be some circumstances under which a record could clearly support an improper purpose finding even with respect to the assertion of an otherwise plausible claim, the Court of Appeals in this case should have considered whether the trial court's inference here would improperly chill the assertion of novel legal claims such as the one advanced below. It should have addressed this issue concerning the construction and application of rule 11 and resolved this apparent conflict with the Ninth Circuit, if possible.

For all of the foregoing reasons, the Court of Appeals in this case erred in deferring to the trial court's discretion. It should have reviewed the trial court's legal conclusions underlying its imposition of rule 11 sanctions upon Null under an essentially *de novo* standard. This Court has recently begun to turn its attention to some of the many issues which have arisen concerning the

construction and application of rule 11 since its amendment in 1983. *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989)(determining who may be sanctioned under rule 11). Indeed, *Cooter & Gell v. Hartmarx*, docket number 89-275, currently pending before this Court, presents this Court with an opportunity to decide several rule 11 questions, including the issue, presented in this petition, concerning the appropriate standard of appellate review of an order imposing sanctions.³ The several federal courts of appeals, too, have recognized the need to make the law governing the imposition of rule 11 sanctions more uniform, and several have recently decided such matters as the appropriate standard of review en banc. Even these courts, however, have failed to agree on a uniform standard of appellate review. *Compare Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) and *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988), with *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987). This Court should therefore grant this petition in order to resolve this issue which currently divides the circuits, cf. S.Ct. Rule 10.1(a), and to address the other important questions, presented supra, concerning the construction and application of rule 11, cf. *Id.* 10.1(c).

³Should this Court resolve that issue in case number 89-275, Null respectfully requests that it grant this petition, vacate the Court of Appeals decision in this case, and remand this case to the Court of Appeals for review under the appropriate standard.

II.

The Constitutional Challenge Presented Below was Warranted by Existing Law or by a Good Faith Argument for the Extension of Existing Law so as to Withstand Proper Scrutiny Under Rule 11.

Aside from its error concerning its articulation of the appropriate general standard for evaluating the legal plausibility of claims under rule 11, *see supra* at 14, the trial court below seriously erred as a matter of law when it concluded that Christy's facial overbreadth challenge to Lansing's occupancy permit provisions was legally frivolous and when it imposed rule 11 sanctions upon Null for articulating and advancing that challenge.⁴ Until Lansing revoked her occupancy permit on August 6, 1987, *see infra* at 2a, Christy was engaged in constitutionally protected speech and other expressive activities at her book, video, and novelty store in Lansing, Michigan. She wishes to continue to engage in such activity at that location in accordance with all applicable zoning laws, (R. Item 1, Complaint at para. 12), and she will have to apply to Lansing for another occupancy permit unless the 1987 permit revocation is nullified and her 1983 occupancy permit is restored. Christy's complaint challenged those provisions of Lansing's building code which permit a municipal official to deny or revoke a building occupancy permit which is necessary for her to engage in her expression from her store in Lansing. She challenged these provisions because they altogether lack the substantive or procedural safeguards which are required of legislation which effectively regulates constitutionally protected speech. *See generally Freedman v. Maryland*, 380 U.S. 51 (1965). In particular, section 307 of Lansing's Building

⁴As argued *supra*, the Court of Appeals should have reviewed the trial court's substantive legal conclusions affecting its sanctions order but failed to do so because it applied an improper standard of review.

Code vests impermissibly broad and insufficiently reviewable discretion in building officials to refuse an occupancy permit or simply to ignore a request for one. It also allows building officials to revoke an occupancy permit for obscure, trivial, or even arbitrary reasons, many of which would not further substantial governmental interests, or may not be unrelated to the suppression of speech, *cf. United States v. O'Brien*, 391 U.S. 367 (1968), all without affording the permittee any prior notice or hearing, *cf. Freedman*, at 58-59.

In this case, Lansing had, in fact, already revoked Christy's permit because Lansing did not believe that Christy would conduct her expressive activities in accordance with its adult use ordinance. *See infra* at 7a; *cf. Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). Because she and many others who wish to engage in constitutionally protected speech and expressive activities on their property in Lansing must obtain an occupancy permit to do so, and because Lansing could revoke or deny an occupancy permit based upon its unilateral and unreviewed prediction concerning the propriety of future expression, Christy asserted that Lansing's occupancy permit provisions could be used, and were in fact used, to regulate or censor a substantial amount of speech; *cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1981); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and she contended that those provisions cannot constitutionally be so applied unless they contain the substantive and procedural protections required by *Freedman* and *O'Brien*.

The trial court erroneously concluded that an overbreadth challenge was not available to Christy because the Lansing Building Code invoked the city's general police powers and did not expressly regulate speech on the basis of its content. *See infra* at 18a, 19a, 20a. This conclusion permeates the trial court's August

30 opinion, and it was the basis upon which the court decided to impose attorneys' fees sanctions upon Christy's counsel under rule 11. Yet the trial court's conclusion that a facial challenge cannot be directed against legislation which does not explicitly regulate constitutionally protected activity simply ignores this Court's recent cases upholding overbreadth challenges to just this sort of legislation. See *City of Houston v. Hill*, 452 U.S. 451 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983). Indeed, this Court has sustained a facial overbreadth challenge to a general zoning ordinance which, like the Lansing Building Code, was a generally applicable police power ordinance which only implicitly and indirectly regulated protected expressive activities. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). In *Schad*, this Court noted that, in assessing generally applicable legislation, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Id.* at 68, citing *Thomas v. Collins*, 323 U.S. 516 (1945). Accordingly, this Court concluded that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* at 68. See also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 458 (1986) (general police power regulations effectively foreclosing speech by all but one cable television carrier violate first amendment).

More recently, and after the trial court proceedings in this case, this Court has reaffirmed that a police power permit requirement which effectively regulates protected speech and which vests wide and unfettered discretion in the officials charged with its enforcement is unconstitutionally overbroad because it potentially allows those officials to decide whether, when, and how to enforce the restrictions on the basis of their own personal reactions to the content of the regulated

speech. *FW/PBS v. City of Dallas*, 110 S.Ct. 596 (1990). In so holding, this Court reaffirmed a long line of cases requiring that legislation contain narrow substantive and procedural constraints whenever it grants to public officials the authority to issue permits which are necessary for the conduct of constitutionally protected expressive activities. See, e.g., *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Freedman v. Maryland*, 380 U.S. 51 (1965).

Essentially, Christy's constitutional challenge to Lansing's occupancy permit provisions sought to combine several established first amendment doctrines and apply them in a coherent fashion to the circumstances in which Christy found herself. Since Lansing was using its occupancy permit provisions in order to enforce its adult use zoning restrictions in advance of any indication that Christy would violate them, cf. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), Christy sought to avail herself of heightened first amendment scrutiny and to assert an overbreadth challenge, cf. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), to establish that Lansing's occupancy permit provisions could not be applied to her because they did not contain the substantive and procedural standards required under the first amendment, *Freedman v. Maryland*, 380 U.S. 51 (1965). Because it erroneously concluded that Christy could not maintain her facial overbreadth challenge because Lansing's occupancy permit regulations "are a generally applicable exercise of police power which only incidentally encumber speech," see *infra* at 18a (emphasis omitted), however, the trial court did not sufficiently appreciate the potential applicability of these well-settled first amendment doctrines and requirements. For this reason, the trial court seriously underestimated the strength of the legal theory underlying Christy's challenge to Lansing's occupancy permit provisions, and it consequently erred

in imposing Rule 11 sanctions upon Christy's counsel.⁵

Finally, in deferring to the trial court's discretion concerning the imposition of the rule 11 sanctions in this case, the Court of Appeals emphasized "the prior history of lawsuits between the parties," *see infra* at 5a, apparently referring to the trial court's "inference that the present action, obviously lacking in merit, may have been commenced for the purposes of revenge or harassment," *see infra* at 22a. While it may at first appear to raise a separate and more fact-sensitive matter, the trial court's "improper purpose" inference in fact depends exclusively upon its prior legal conclusion that the Christy's constitutional challenge was wholly meritless. The trial court did not purport to rely on any particular knowledge, whether from the record or elsewhere, concerning the motivation of the parties and their attorneys in litigating this action. Indeed, the trial court initially appeared to find that the challenge which Christy presented below was "well grounded in fact," *cf.* Fed. R. Civ. P. 11, because Lansing's "revocation [of Christy's occupancy permit] forms the factual backdrop for the complaint," *see infra* at 17a. Furthermore, beyond noting that "this is but one of several recent lawsuits between the parties regarding the operation of the same adult bookstore," *see infra* at 22a, the trial court said nothing about the nature or effect of the prior lawsuits. Rather, the trial court simply and summarily concluded

⁵Quite apart from the trial court's erroneous conclusion that Christy's challenge to Lansing's occupancy permit provisions was sanctionably frivolous, the trial court also erred in assessing against Christy's counsel the full \$5,592.50 which Lansing requested as costs and attorneys' fees sanctions under rule 11 without examining any detailed contemporaneous time records or taking any testimony regarding the reasonableness of the services performed or of the hourly rates charged. The trial court should not have summarily concluded that the unsworn and often vague "bill of costs" which Lansing had submitted with its motion for sanctions, (R. Item 10, Motion for Attorneys' Fees, Exh. 2), was "reasonable." *See infra* at 23a.

that the present action may have been commenced for an improper purpose merely because it had already concluded, *see infra* at 21a, that it served no proper purpose. Under these circumstances, the trial court's improper purpose inference depends essentially upon its erroneous legal conclusion, assessed *supra*, and it affords no independent basis for deference on the part of the Court of Appeals.

The trial court, in fact, expressly linked its "improper purpose" inference with its legal conclusion that Christy's challenge was frivolous. It articulated that inference only after it had justified the imposition of rule 11 sanctions in an extensive discussion designed to demonstrate the frivolousness of Christy's challenge. *See infra* at 17a-21a. Even then, the trial court reiterated its prior conclusion that the action was "obviously lacking in merit," *see infra* at 22a, in inferring that the action may have been brought for an improper purpose. Indeed, the trial court ultimately rested upon nothing more than that conclusion to support its improper purpose inference. It never determined, for instance, that any of the prior litigation between the parties in any way precluded the challenge which Christy advanced below. It never even specified which of the prior lawsuits it believed supported the inference to which it alluded. The only real content of the trial court's inference is that there may have been an improper purpose lurking behind the complaint because the trial court could see no proper purpose in its filing. As noted *supra*, the trial court simply erred in failing to recognize a proper purpose.

Perhaps because the trial court offered its improper purpose inference only as an afterthought which itself depends upon the court's prior conclusions concerning the merits of Christy's constitutional challenge, *see infra* at 22a.⁶ it never specified what portion of the parties'

⁶As a further indication of the afterthought nature of the trial court's

litigation history it was relying upon to support the inference. While the trial court originally offered its "initial conclusion" that the present litigation involved an improper collateral attack upon the state court proceedings between the parties, *see infra* 8a, it did not ultimately advance this theory in support of the sanctions which it imposed. *See infra* at 21a. Indeed, it could not have done so since the preliminary injunctive relief which had so far been obtained in the state proceeding had no preclusive effect under Michigan law, *Goodrich v. Moore*, 8 Mich. App. 725, 728-29, 155 N.W.2d 247, 249 (2nd Div. 1967), *leave to appeal den'd* 380 Mich. 764 (1968), and because Lansing had never asserted any other reason why the state litigation might have affected this case. Nor did the trial court ever claim that any of the previous federal actions in any way precluded the present suit. Although Lansing complained at length before the Court of Appeals about that fact that the parties have engaged in a number of lawsuits over the past seven years, it altogether failed to demonstrate either that Christy could have raised the challenge presented below in any prior suit,⁷ or that the claim splitting rules applicable in the Sixth Circuit required her to do so. *Cf. King v. South Central Bell Telephone Co.*, 790 F.2d 524 (6th Cir. 1986); *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224 (6th Cir. 1981). Thus absolutely nothing in the parties' litigation "history" provides any independent basis for the imposition of sanctions under rule 11 on the ground that the complaint filed below was somehow frivolous, or was interposed for an improper purpose.

inference, the court altogether failed to explain how an inference of a party's bad faith could support sanctions against counsel. *Cf. Dreis & Krump Manufacturing Co. v. International Ass'n of Machinists*, 802 F.2d 247 (7th Cir. 1986) (sanctions apparently imposed upon party).

⁷Lansing did not decide to revoke Christy's occupancy permit until after the issues in the parties' previous federal lawsuit had been fully litigated and

Because the trial court below seriously erred in assessing the legal merits of the constitutional challenge which Christy advanced in the court below, it is likely that the Court of Appeals would have reversed its conclusion that that challenge was sanctionably frivolous had the Court of Appeals applied the proper essentially de novo standard of review urged *supra*. For this reason, this Court should grant the instant petition, establish the proper standard for appellate review of the legal conclusions underlying orders imposing rule 11 sanctions, and remand this case to the Court of Appeals for further consideration of the trial court's August 30, 1988 order in light of the proper standard of review.

submitted to the judge for decision. Thus Christy lacked standing to challenge the occupancy permit provisions in the earlier litigation. *Cf. Oriental Health Spa v. City of Fort Wayne*, 864 F.2d 486 (7th Cir. 1988); and *Bronson v. Board of Education of Cincinnati*, 525 F.2d 344 (6th Cir. 1975), *cert. den'd* 425 U.S. 934 (1976).

CONCLUSION

For all of the foregoing reasons, this Court should direct a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in order to determine the foregoing important general questions concerning the construction and application of rule 11 of the Federal Rules of Civil Procedure and to resolve the conflict among the federal courts of appeals concerning the proper standard of review to be applied in reviewing the legal determinations upon which a trial court has based the imposition of sanctions under that rule.

Respectfully submitted,

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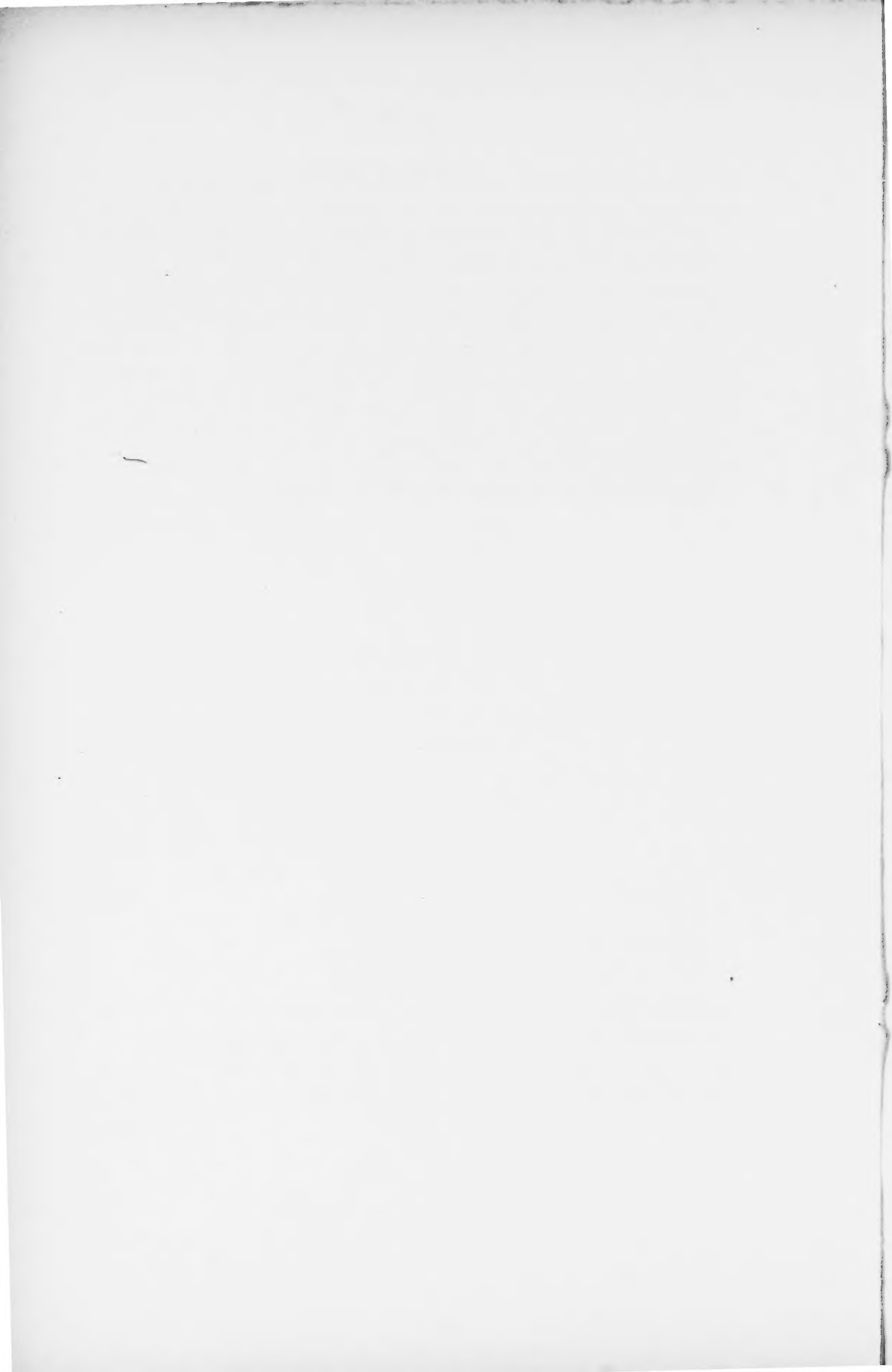
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Of Counsel:

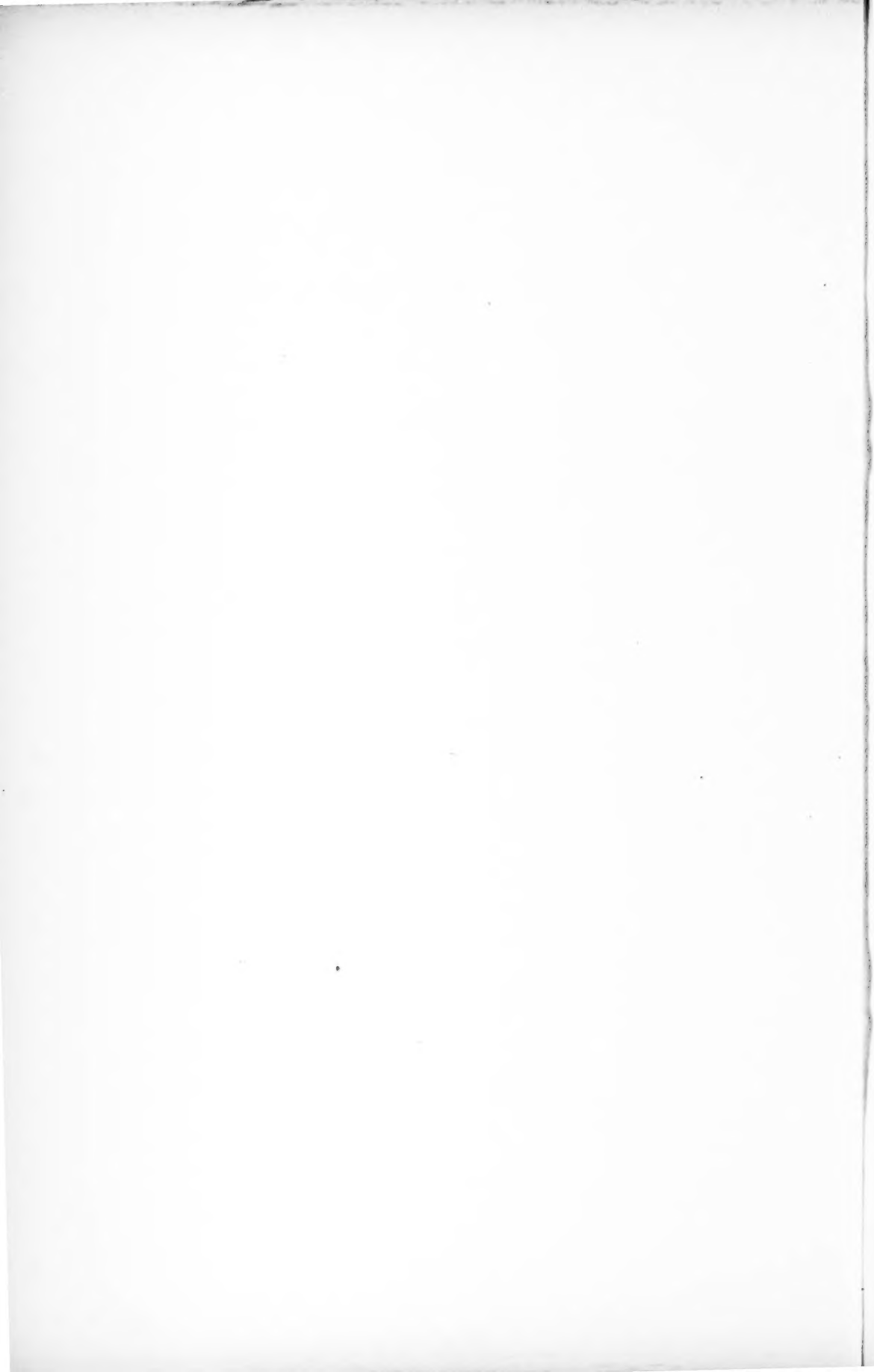
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May 29, 1990



APPENDIX



Nos. 88-1868, 88-2003

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**KAREN CHRISTY,
Plaintiff-Appellant,
MICHAEL NULL,
Attorney-Appellant,**

v.

**THE CITY OF LANSING,
Defendant. Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
MICHIGAN.**

893 F.2d 1334 (6th Cir. 1990) (table)

January 17, 1990

Before: MARTIN, JONES, and GUY, Circuit Judges.

PER CURIAM. Karen Christy appeals the district court's denial of her motion under Rule 4(a)(5) of the Federal Rules of Appellate Procedure to permit late filing of her notice of appeal of the court's dismissal of her action challenging the constitutionality of the occupancy certificate provisions of the City of Lansing Building Code. Christy's attorney, Michael Null, appeals the district court's decision to assess attorney's fees sanctions under Rule 11 of the Federal Rules of Civil Procedure.

This is the most recent in a series of lawsuits and appeals arising out of Christy's desire to continue

operating an adult store at 1933 North Larch Street, Lansing, Michigan. On May 16, 1983, Christy originally filed a 42 U.S.C. Section 1983 action against the City, requesting that the spatial zoning restrictions in the City's zoning ordinance violated her rights under the 1st and 14th Amendments. Christy also filed a motion for a preliminary injunction to restrain the City from enforcing the ordinance. Because the ordinance was amended, the district court dismissed the case as moot. This court upheld the decision of the district court.

On April 2, 1984, Christy filed a second action. That action was also brought under 42 U.S.C. Section 1983 and challenged the amended (and current) zoning ordinance as being unconstitutional under the 1st Amendment, and as being vague and overbroad. The district court upheld the zoning ordinance. This court again affirmed the decision of the district court.

In the meantime, Christy had separately appealed the refusal of the district court to grant her actual attorney fees in the Section 1983 action dismissed as moot. Once again, this court affirmed the decision of the district court, noting that Christy had failed to timely appeal the district court's order.

On August 6, 1987, the certificate of occupancy issued to Christy in 1983 was revoked by the City. On March 8, 1988, Christy filed this action in the same district court. Christy sought a declaration that the Certificate of Occupancy provisions of the Lansing Uniform Building Code were overbroad because they could be used, and allegedly were used, to censor or punish constitutionally protected speech without any of the substantive or procedural safeguards required of legislation which directly or indirectly regulates speech. Christy also sought both preliminary and permanent injunctive relief against enforcement of the occupancy code provisions against her.

After both parties briefed the preliminary injunction issues, on May 24, 1988, the district court heard the parties's arguments on those issues. At the conclusion of that hearing, the district court denied Christy's request for a preliminary injunction. The district court also held that Christy's claim was "lacking in merit, frivolous and an attack collaterally upon judgments or rulings in other lawsuits," and it dismissed this action.

On July 6, 1988, Christy moved in the district court, pursuant to Federal Rule of Appellate Procedure 4(a)(5), for leave to file late her notice of appeal seeking review of the district court's May 24 order dismissing this action. The district court denied Christy leave to file late her notice of appeal. Christy filed a timely notice of appeal from the July 12 denial on August 4, 1988.

On July 7, 1988, the City filed a motion seeking \$5,592.50 in attorneys's fees sanctions under Rule 11 of the Federal Rules of Civil Procedure. On August 30, the district court entered an opinion and order granting to the City the entire amount it had requested as costs and attorneys's fees. The district court stated that the facts and law are so plain as to render unavoidable the conclusion that Christy's counsel either knew or should have known that Christy's complaint is frivolous. Without determining that Christy's counsel acted in bad faith, the court noted the prior history of lawsuits between the parties. The court stated that this history creates an inference that the present action, so obviously lacking in merit, may have been commenced for purposes of revenge or harassment.

The district court reviewed the bill of costs submitted by the City and found it to be reasonable. The court found that "the amount prayed for represents an appropriate sanction inasmuch as (1) these expenses were necessitated solely by this groundless lawsuit; and

(2) the amount is commensurate with the purposes of punishing the instant wrong and deterring future abuse of the right of access to the courts." The district court imposed the sanction against Christy's counsel, Michael Null.

On appeal, Christy argues that the district court's denial of her motion for leave pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure to file her notice of appeal was inextricably intertwined with its erroneous conclusion that her constitutional challenge was frivolous, and therefore that denial must be reversed.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure states that the district court may permit the late filing of a notice of appeal based upon "excusable neglect or good cause" if a request for such leave is made within 30 days from the expiration of the period during which a party must file a notice of appeal as of right. Thus, it is within the district court's discretion to allow or deny the late filing of a notice of appeal based upon whether the standard of "excusable neglect" has been met.

The inquiry on appeal is limited to the question of whether the district court abused its discretion in denying the extension. *Benoist v. Brotherhood of Locomotive Engineers*, 555 F.2d 671, 672 (8th Cir. 1977). Christy stated that her counsel's secretary simply forgot to file her notice of appeal on the appropriate date. The district court held that this excuse did not meet the "excusable neglect" standard, and we agree. We find, therefore, that the district court did not abuse its discretion in denying Christy leave to file late her notice of appeal.

Christy's other argument is that its facial challenge to the occupancy permit provisions was fully warranted by existing law or by a good faith argument for the

extension of existing law; and the district court, therefore, erred in determining that its challenge was sanctionably frivolous.

The test for the imposition of Rule 11 sanctions in this circuit is whether the individual's conduct is reasonable under the circumstances. *INVST Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391, 401 (6th Cir. 1987). A district court's decision regarding such sanctions is reviewed under an abuse of discretion standard because "of the district court's more intimate knowledge of the facts of these cases." *Century Products, Inc. v. Sutter*, 837 F.2d 866, 872 (6th Cir. 1988). Given the facts of this case, especially the prior history of lawsuits between the parties, we cannot say that the district court abused its discretion in imposing Rule 11 sanctions against Christy's attorney, Mr. Null.

Accordingly, the judgment of the district court is affirmed.

Nos. 88-1868, 88-2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KAREN CHRISTY,
Plaintiff-Appellant,
MICHAEL NULL,
Attorney-Appellant,

v.

THE CITY OF LANSING,
Defendant. Appellee.

ORDER

February 20, 1990

Before: MARTIN, JONES, and GUY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by the appellant, Michael Null, the Court concludes that the issues raised were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

**ORAL REMARKS OF HON. ROBERT HOLMES BELL
OF MAY 24, 1988 IN KAREN CHRISTY v. THE CITY
OF LANSING, CIVIL ACTION NO. L88-61CA,
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN
DIVISION.**

The plaintiff, Karen Christy, appears to be the owner or the lessee of a book, magazine, and video store located at 1933 North Larch Street in the City of Lansing. It is this action, among other actions, in which she challenges the occupancy certificate provisions of the Lansing Building Code labeling them as unconstitutional contending, in basic gist of it, that the code unlawfully restricts her freedom of speech.

It appears that on October 20th, 1983, an occupancy permit was issued to the plaintiff for the purpose of operating a retail store 1933 North Larch Street. It appears that on August 6, 1987, the permit was summarily revoked by one James K-Z-E-S-K-I, the director of the City of Lansing Building Safety Division; and this was attached to the Brief in support of the plaintiff's motion and is incorporated herein for purposes of this explanation.

The letter in part cites several ordinance provisions as the reasons for the revocation. The City explains in its Brief in opposition to this motion that the plaintiff's permit was revoked because: One, the plaintiff expressed her intent to operate as an adult use, which is specifically prohibited at that location by the ordinance, this Court, obviously having ruled in this matter on another case; secondly, that the defendant had defied the City's stop work order by continuing to make structural changes without obtaining the required building permits. Interestingly, in this case, the plaintiff does not specifically contest the revocation process per se. Rather, plaintiff here chooses to pose a facial challenge to the

occupancy permit application procedure even though she's not alleged that she applied for and was denied such a permit.

In this respect this court finds that this case is almost directly a collateral attack upon the Ingham County Circuit Court action being 87-59439-CZ, the matter in which Judge Houk had issued a preliminary injunction prohibiting the operation of an adult use at 1933 North Larch and permitting any other use of the property upon obtaining an occupancy permit. This Court would appear the collateral estoppel is applicable here. At least that would be the initial conclusion.

Plaintiff's constitutional challenge here is basically two-pronged: First, that the occupancy permit application procedure is defective because it provides no deadline within which the City must act upon an application; secondly, it is contended that the ordinance is devoid of narrow, objective, and definite standards which guide the City official's exercise of discretion when acting upon said application.

Now, this Court, on its own, cannot help but raise the standing issue. In *Freedman v. Maryland*, 380 U.S. 57 -- 51 at page 56, 57, the Court held that a licensing requirement that may affect a prior restraint on speech may be challenged by one who has not applied for a permit. The reasoning is that the purpose for which a license is sought may have come and gone before a court to able to pass on the constitutionality of the regulatory scheme. The merits of this reasoning are obvious when, for instance, a parade permit is at issue; but whereas here, the ordinance in question does not directly restrict speech but only incidentally touches speech. The applicability of the *Freedman* exception to the standing doctrine is highly questionable to these particular facts; however, I just raise that as a question.

There seems to be no contest concerning plaintiff's assertion that the Lansing ordinance contains no time limit within which the building official must act upon an application for an occupancy permit. That appears to be conceded. The question is whether the Constitution requires such a time limit. In an occupancy permit ordinance the City appears to indicate that none is required, and this Court must agree.

Because the cases cited by the plaintiff in support of this proposition involve direct restrictions on speech, the *Freedman v. Maryland* case that we have -- we've heard about, the *Citizens for a Better Environment v. the Village of Olympia*, which is a northern Illinois case, door to door to door solicitation case attack found at 511 F. Supp. 104, 1980 case, naturally in such cases unless a licensing official is required to act upon an application within a reasonably short period of time there would be an effective denial of speech through an action. Here, however, the freedom of speech interests involved -- only incidentally touched upon the Lansing Building Code and clearly are not as compelling as the *Freedman* and the *Village of Olympia*.

Plaintiff importantly has cited no law which supports the assertion that any occupancy permit ordinance must contain a time limit, and with the amount of litigation in this particular area one would think that somewhere that would have been decided, at least favorable to the plaintiff, would have been brought to the Court's attention.

Therefore, the Court must conclude that the plaintiff has not rebutted the presumption of constitutionality which attaches to this City ordinance.

It is axiomatic that when discretionary authority is delegated to executive officers such as Building code officials it must be accompanied by narrow, objective,

and definite standards. Here, if one looks at Section 307, subsection (c) of the Lansing Building Code, one finds the following provisions:

"After filing inspection, which it is found that the building or structure complies with the provisions of this code and our laws which are enforced by the code enforcing agency, the building officials shall issue a certificate of occupancy."

Plaintiff's objections to this language is that it contains no meaningful standards to guide the licensing authority. It is contended by the plaintiff that it gives the City unlimited discretion to decide upon licensing application such as we see in *Fantasy Books v. Boston*, 6052 F.2d 1000 — 1115, which is a 1st Circuit case from '81, where it is held unconstitutional a standard for a license denial if the adult business otherwise significantly harmed the protected interests of citizens.

Then *Amico v. New Castle*, 571 F. Supp. 160, which is a District Court of Delaware case here, 1983, where they struck down a law permitting a license denial if the proposed use might detrimentally affect the neighborhood. Certainly in *Fantasy Books* and *Amico* we find rather vague standards such as "detrimentally affect the neighborhood" and otherwise significantly harms protectible interests.

In contrast to these general standards found clearly unconstitutional and appropriately so, the Lansing ordinance incorporates by reference all the compliance requirements of the Building Code and other laws enforced by the code agency.

This Court observes in this Building code that the Lansing ordinance is replete with standards and certainly provides adequate restraints upon the City official's discretion. Very importantly, unless that city official finds

a violation of a specific code provision, the official shall issue a certificate of occupancy. It's not may but it shall.

Actually here the plaintiff's challenge only makes sense if it was construed as an objection to a decision by the building official denying a permit which does not innumerate code violations. But quite the converse is true here. If the reason given for the denial were simply that the building fails to comply with the Building Code and the laws, then plaintiff might have a legitimate due process claim attacking the decision of denial without specification, not the ordinance. Here, though, as a matter of fact, the letter revoking the plaintiff's building permit, although that letter is not at issue but is attached in documentation thereto, appears to specifically innumerate eight code violations, both topically and by way of their numerical calculation within the code provisions. Plaintiff has not stated, therefore, this Court finds, a valid facial challenge to the Building Code.

Now, plaintiff argues that this ordinance is an egregious infringement of free speech. Leaving that exaggeration aside, the Court finds that the ordinance is absolutely speech content neutral. Section 307 regulates buildings and structures, not building and structures for which newspapers or free speech can take place, but buildings and structures period.

It is a legitimate exercise, this Court finds, of governmental police power, therefore promoting the general health and welfare. The City contends in and this Court finds that the ordinance satisfies the tests innumerrated in *United States v. O'Brien*, 391 U.S. 657 where at 676 it is enumerated as follows:

A governmental regulation is sufficiently justified if it is within the constitutional power of government, here clearly is; if it first an important or substantial government interest, and clearly the code provisions

regarding buildings and structure as it pertains to fire, health, safety, and other matters are clearly furthering substantial interest; third, if the government interest is unrelated to the suppression of free expression.

This has to do with the safety and zoning of buildings as one's imagination is stretched to find where this fits in to suppression of free expression; and if the incidental restriction on the alleged First Amendment pleading is no greater than essential to the furtherance of that interest, and this Court would find at least facially and that that is the case of the plaintiff, presents a facial challenge citing two specific defects.

This Court finds that the ordinance is not facially defective on either count. Naturally, the ordinance could be abusively endorsed so as to infringe upon speech interest; but no such instance of enforcement in fact has been alleged or appears to be at issue here.

Before this Court specifically this morning is the plaintiff's motion for a preliminary injunction. The standards for which the 6th Circuit evaluates the issuance of a preliminary injunction are set forth most recently in the case of *In Re Delorean Motor Car Company*, 755 F.2d 1223, which is a 6th Circuit case from 1985 wherein it is said a preliminary injunction motion in the 6th Circuit is determined by consideration of one, the movant's likelihood of success on the merits; two, the irreparable injury the movant will suffer if the preliminary injunction is not granted; three, whether the preliminary injunction will harm other parties; and four, whether the preliminary injunction is in the public interest.

The test is a flexible one, and the factors are not prerequisites but must be balanced. The degree of likelihood on the success of merits that must be shown decrease as the strength of the showing of the other

factors increases, and the movant need only demonstrate a sufficiently serious question to justify further investigation, not a strong likelihood of success on the merits if the other three factors strongly support a preliminary injunction.

This Court finds specifically in this case that the plaintiff has not carried her burden of proof under the above test. This Court finds that the plaintiff's claim has little likelihood of success on the merits. The plaintiff has presented really no argument nor any evidence regarding the question of irreparable injury, the second prong, nor is there an indication that anyone will suffer if an injunction does not issue.

Further, this Court finds that under the innumeration the Court has just gone through that a preliminary injunction is clearly not in the public interests in this matter; therefore, the motion here is denied.

This Court further proceeds as follows and dismisses this action. This Court finds that this case, as it is postured, as it is pled, as it has been briefed, is clearly and patently lacked in injurious provincial merit and accordingly should not be permitted to remain on this Court's docket for further proceedings; and this Court on its own motion dismisses said matter.

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**KAREN CHRISTY,
Plaintiff,**

-vs-

**THE CITY OF LANSING,
Defendant.**

**File No. L88-61 CA
HON. ROBERT HOLMES BELL**

ORDER OF DISMISSAL

Counsel having filed and argued plaintiff's Motion for a Preliminary Injunction which This Court denied on the record;

This Court having reviewed plaintiff's allegations, determines said action is lacking in merit, frivolous and an attack collaterally upon judgments or rulings in other lawsuits.

Now therefore, this matter is hereby DISMISSED with prejudice.

Dated: May 24, 1988

**ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE**

Karen CHRISTY, Plaintiff
v.
CITY OF LANSING, Defendant
No. L88-61 CA.
United States District Court,
W.D. Michigan, S.C.

Aug. 30, 1988.

693 F. Supp. 558 (W.D. Mich. 1988).

OPINION OF THE COURT

ROBERT HOLMES BELL, District Judge.

This case presents a challenge to the constitutionality of the occupancy certificate provisions of the City of Lansing Building Code. On May 24, 1988, the Court dismissed the complaint in its entirety upon finding it to be patently frivolous and totally devoid of merit. In the wake of this ruling followed defendant's motion for imposition of sanctions under Fed. R. Civ. P. 11. Having given due consideration to the briefs and oral arguments of counsel, presented on August 10, 1988, the Court now adjudicates the motion.

I

Rule 11¹ provides for the imposition of an

¹The full text of Rule 11 provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by

appropriate sanction where the signature appearing on a legal paper filed in the court is found to not represent what it is required to represent, i.e., certification that the contents of the paper are, after reasonable inquiry, (a) believed to be well-grounded in fact; (b) believed to be warranted by existing law or a good faith argument for the modification thereof; and (c) not interposed for any improper purpose. If a signed pleading, motion or other paper is found to be in violation of Rule 11 in any one of these three particulars, the Court *must* impose an appropriate sanction. In this respect, the Court has no discretion. *INVST Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391, 401 (6th Cir. 1987).

In dismissing the present complaint, the Court made a summary determination essentially that plaintiff's challenges to the constitutionality of the Lansing Building code were not warranted by existing law and that no colorable justification for modification of existing law had been presented. The motion to impose sanctions asks the Court to find that plaintiff's counsel, Michael Null, did not have a reasonable belief that a different

corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

result would obtain. This conclusion would have to be based upon a finding either that counsel had not made a reasonable prefiling inquiry into the legal basis for the complaint; or that, notwithstanding his reasonable prefiling inquiry, counsel filed the complaint, with knowledge that it was of dubious merit, for an improper purpose, such as harassment. Counsel's conduct must be evaluated in terms of whether it was objectively reasonable under the circumstances. *Id.*

II

The first step in evaluating counsel's conduct is to examine the product of his efforts, the complaint. Plaintiff, Karen Christy has operated and wishes to continue operating an adult book, magazine and video store at 1933 N. Larch Street in Lansing. This, she asserts, is in exercise of her right of free speech protected under the First Amendment. On August 6, 1987, the certificate of occupancy issued in 1983 for the building situated at 1933 N. Larch Street was summarily revoked by the City of Lansing. While this revocation forms the factual backdrop for the complaint, presumably conferring standing, the complaint does not challenge the revocation directly. Rather, the complaint presents a *facial* challenge to the constitutionality of the Lansing Building Code. Specifically, the occupancy permit provisions are said to be constitutionally infirm because they specify no time period within which the City must act upon applications; and because they are devoid of "narrow, objective and definite standards" which guide the City official's exercise of discretion in acting upon applications and in revoking occupancy permits. There is no allegation that the occupancy permit provisions are unconstitutional "as applied" to plaintiff and no allegation that they have been enforced so as to discriminate against First Amendment protected speech based on content or otherwise.

The ordinance under attack is a legitimate exercise of governmental police power which promotes the public health, safety and welfare by regulating buildings and structures. It is absolutely speech content neutral. Yet, plaintiff complains the ordinance is unconstitutional because the regulation of buildings accomplished thereunder may incidentally restrict speech within the buildings without providing the requisite procedural safeguards.

III

Plaintiff asserts in Count I that the ordinance should specify a time period within which the City must act upon an occupancy permit application. Otherwise, it is contended, the City could, by delay in processing a permit application effectively deny the First Amendment rights of one who wished to engage in protected speech within the subject building. In support, plaintiff cites *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). In *Freedman*, the Supreme Court struck down a motion picture censorship statute which failed to provide assurance of a prompt determination on an application for a license to exhibit a film.

The statute at issue in *Freedman* is materially distinguishable from the Lansing Building Code. The censorship statute represented a direct and prior restraint on speech based on content, thus "bearing a heavy presumption against its constitutional validity," and requiring carefully designed procedural safeguards. *Id.*, 380 U.S. at 57, 85 S. Ct. at 738. The Lansing Building Code occupancy provisions, on the other hand, are a *generally applicable* exercise of police power which only incidentally encumber speech. Otherwise valid laws of general applicability which serve substantial public interests do not offend the First Amendment even though speech may be burdened thereby. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of*

Revenue, 460 U.S. 575, 581, 103 S. Ct. 1365, 1369, 74 L. Ed. 2d 295 (1983); *Branzburg v. Hayes*, 408 U.S. 665, 682-83, 92 S. Ct. 2646, 2657-58, 33 L. Ed. 2d 626 (1972). Furthermore, the circumstances noted in *Freedman* which rendered time of the essence when a motion picture is subject to a prior restraint are simply not applicable to regulation under the Lansing Building Code. Thus, a generally applicable police power regulation which incidentally restricts speech need not contain carefully drawn procedural safeguards to satisfy the First Amendment. That the Lansing Building Code serves a legitimate governmental purpose and is rationally related thereto is sufficient to sustain it.

Plaintiff's counsel admits there is no case law which directly supports the asserted theory, but he insists the prayer for an extension of existing law is made in good faith.² However, it occurs to this Court there is little support for the theory because it offends not only constitutional law, but also common sense. Local government would be hopelessly hamstrung in its efforts to maintain and improve public health, safety and welfare, if promulgation of general regulations necessitated accommodations for potential incidental effects upon the exercise of individual civil liberties. While it may be agreed that a specified time period would be a worthwhile addition to the Lansing Building

² Plaintiff's counsel cites three cases for the proposition that even content-neutral regulations are subject to closer scrutiny when they burden speech. *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987); *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 106 S. Ct. 2034, 90 L. Ed. 2d 480 (1986). The argument ignores the critical fact that in each of these cases, legislation which directly and purposefully burdened speech was at issue. Thus, all three cases are clearly and materially distinguishable from the present action.

Code, to suggest the ordinance is unconstitutional *per se* for lack of such a provision because it may be applied to buildings where First Amendment activity may take place is patently groundless.

IV

Counts II and III of the complaint assert the Lansing Building Code is unconstitutional because it enables prior restraint of speech without providing sufficiently narrow, objective and definite standards to guide the City official in the exercise of discretion. *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969). These claims are flawed in the same manner as count I. They are based on the false premise that the Lansing Building Code is a direct restraint on speech. It is not. It is rather a legitimate exercise of police power, a regulation of general applicability which only incidentally burdens speech. Therefore, as discussed *supra*, the ordinance need not contain carefully drawn procedural safeguards, like specific standards, to pass constitutional muster.

On the other hand, even if such a requirement were applicable, it plainly appears the Lansing Building Code would be in compliance. With respect to issuance of a certificate of occupancy, the ordinance provides;

After final inspection when it is found that the building or structure complies with the provisions of this code and other laws which are enforced by the code enforcement agency, the building official shall issue a Certificate of Occupancy...

Uniform Building Code, Sec. 307(c). With respect to revocation of a certificate, the ordinance provides:

The building official may, in writing, suspend or revoke a Certificate of Occupancy issued under the provisions of this code whenever

the certificate is issued in error, or on the basis of incorrect information supplied, or when it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.

Uniform Building Code, Sec. 307(f). Thus, exercise of the building official's authority in denying or revoking a certificate is conditioned upon a determination that the subject building is not in compliance with governing laws. Though the governing laws are not reproduced at length at Sec. 307 of the code, they are incorporated by reference and clearly provide specific and objective guidelines for the exercise of the building official's discretion. Accordingly, the Lansing Building Code is clearly not unconstitutional on its face for lack of definite standards.

V

The Court has reiterated the reasons for the earlier dismissal of the complaint to explain why it is properly characterized as frivolous. Furthermore, it is apparent that the state of the facts and law is so plain as to render unavoidable the conclusion that plaintiff's counsel either knew or should have known that it was frivolous. It is unnecessary to determine which of these alternatives is true--either, standing alone, constitutes a Rule 11 violation.

Plaintiff's counsel's insistence that he acted in good faith offers no defense to the motion for sanctions, for the standard is one of *objective* reasonableness under the circumstances.

Rule 11 requires counsel to study the law before representing its contents to a federal court. An empty head but a pure heart is no

defense. The Rule requires counsel to read and consider before litigating. Counsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorneys' fees under the Rule.... It is not acceptable to make an assertion of law and hope that it will turn out to be true.

Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986). Counsel's signing and filing of the complaint was not reasonable under the circumstances.

Counsel argues that penalizing him for asserting a creative legal theory will have a "chilling" effect upon assertion of First Amendment rights. The Court is not unmindful of this very real concern. Yet, creativity by itself is not enough. Unless creativity is employed in service of a good faith application of the law or at least a good faith request for a change in the law, it is precisely the sort of creativity Rule 11 should chill. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3rd Cir. 1987).

Without determining that plaintiff's counsel acted in bad faith, the Court notes this is but one of several recent lawsuits between the parties regarding the operation and regulation of the same adult bookstore. This history creates an inference that the present action, obviously lacking in merit, may have been commenced for purposes of revenge or harassment. Such an abuse of legal process is clearly in violation of Rule 11. One who seeks vindication in federal court and fails must expect to pay his opponent's reasonable attorney's fees. *Dreis & Krump Mfg. v. International Ass'n of Machinists*, 802 F.2d 247, 255 (7th Cir. 1987). That plaintiff's counsel is from out-of-state and was purportedly unaware of the parties' past history certainly does not absolve him of responsibility for conducting a reasonable prefiling investigation. And inasmuch as plaintiff's counsel was assisted by local counsel, Franklin Brussow, who is

familiar with the parties' history, he is without excuse.

Accordingly, the Court finds the instant complaint was signed and filed in violation of Rule 11. An appropriate sanction is mandated.

VI

The Court is vested with considerable discretion in fashioning an appropriate sanction. *INVST Financial Group v. Chem-Nuclear Systems, supra*, 815 F.2d at 401. The Court must consider the goals of Rule 11, "which are the deterrence and punishment of offenders and the compensation of their opponents for expenditure of time and resources responding to unreasonable pleadings or motions." *Id.*, 815 F.2d at 404. Rule 11 expressly provides that an appropriate sanction may include an award of a reasonable attorney's fee.

Here, defendant City of Lansing asks the Court to award it total costs and attorney's fees of \$5,592.50. The Court has reviewed the bill of costs submitted and finds it to be reasonable. The time and resources expended in defense of this action appear to be reasonable under the circumstances. The Court further finds the amount prayed for represents an appropriate sanction inasmuch as (1) these expenses were necessitated solely by this groundless lawsuit; and (2) the amount is commensurate with the purposes of punishing the instant wrong and deterring future abuse of the right of access to the courts. This sanction is to be imposed upon plaintiff's counsel, Michael Null, who signed the complaint, because, regardless of plaintiff's true motives, counsel was ultimately responsible for ensuring any claim presented was based on good faith application of the law. An order consistent with this opinion, imposing this monetary sanction upon plaintiff's counsel and awarding the same amount to defendant, shall issue forthwith.

ORDER OF THE COURT

In accordance with the Court's written Opinion issued on August 30, 1988,

IT IS HEREBY ORDERED that the motion of defendant City of Lansing for imposition of a sanction under Fed. R. Civ. P. 11 is GRANTED;

IT IS FURTHER ORDERED that a sanction in the amount of \$5,592.50 is imposed upon plaintiff Karen Christy's counsel, Michael Null;

IT IS FURTHER ORDERED that this sanction in the amount of \$5,592.50 is hereby awarded to defendant City of Lansing.

